

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-7083

B-215
ORIGINAL

In The
United States Court of Appeals
 For The Second Circuit

EUGENE E. NERVINA,
Plaintiff-Appellant,

vs.

LIEBERT CORPORATION, JOHN AMBROSE, and JAMES
 W. GOOD,

Defendants-Appellees.

*On Appeal from the United States District Court for the
 Southern District of New York.*

**PETITION FOR REHEARING AND THE
 DETERMINATION OF CAUSES BY THE
 COURT EN BANC**

ANTHONY M. MAHONEY
Attorney for Plaintiff-Appellant
 170 Broadway, Suite 201
 New York, New York 10038
 (212) 349-1980

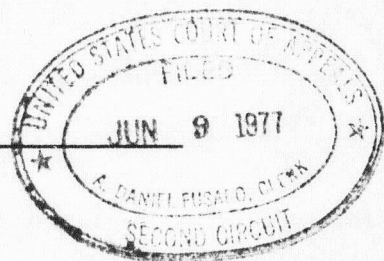


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UNITED STATES COURT OF APPEALS

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THE COURT IN BANC

Plaintiff-Appellant Eugene E. Nervina desires to suggest that this petition for rehearing be reheard by the Court of Appeals in banc under F.R. App. P. 35.

This Petition for rehearing is requested by Plaintiff-Appellant Nervina under F.R. App. P. 40 for the reason that the Court has apparently overlooked relevant facts in this dispute and has misapprehended controlling points of New York substantive law. The facts clearly demonstrate, and

petitioner has never denied the existence of a letter of release dated August 10th, 1976. It is the limitation of said release letter that is in dispute and which has never been adequately explored in pretrial discovery, let alone at a trial on the merits. Likewise, the Court has not ruled on the words of limitation contained in the letter release.

Controlling New York law on releases is not in dispute but has been misapplied to the facts of this case. These facts are that the letter of August 10th has clear language of limitation which negates its effectiveness as a general, all encompassing release, as claimed by defendants. The first, and only full page of this letter consists of thirty lines of specific claims and controversies over wages and bonuses. Thirty lines of words of limitation dealing only with "claims made against Liebert for compensation", "payment of certain bonuses", payment of a "salary check" and deductions for income "withholding taxes". Thirty lines written by the defendants' attorneys aimed specifically at putting an end to "this controversy" over a bonus payment. Defendants' attorneys drafted thirty lines of specific recitals which related solely to the issue of compensation and bonuses. They followed this on page two with the standard eight line omnibus clause, here coupled

again with specifics relating to the payment of income taxes and the return of defendants' files by petitioner. These are the admitted facts.

The applicable law is likewise clear and is not in dispute. It has not, however, been cited in its entirety by defendants nor apparently applied in its entirety by the Court. As set out in New York Jurisprudence, the language of the omnibus clause of a general release does not of itself dispose of all possible rights, claims and obligations existing between the parties. The general words of release cannot take full effect if matters have been particularly described in the instrument. This ejusdem generis rule has long been accepted by the courts of New York. It is a vital element in New York law on releases and discharges. Seifer v. Tuttle, 2 App. Div. 2d 927, 156 N.Y.S. 2d 470 (1956).

New York Jurisprudence sets forth the effect of the rule on the New York law of Release and Discharge in Section 34, P. 408 and 409.

"Thus, it is well settled that general words of release are deemed to be limited by a recital of a particular claim, obligation, or controversy where there is nothing on the face of the instrument, other than general words of release,

indicating that matters other than those specifically referred to were intended to be discharged. The reason for this is that the recital is presumed to express the intention of the parties as to the scope of the instrument, and if other matters are intended to be included, specific language must be used declaratory of such intent."

The rule and its rationale becomes even more evident when we realize that the instrument in question was drafted in its entirety by defendants' attorneys. Their control of its scope and their detailed recital of the specific claim then being settled, i.e., wages and bonuses due, limited its application by operation of New York law to something less than a general release. Although the letter of August 10th was indeed a letter of release, it was a release which by its drafters use of particulars, was limited to the scope of the specific controversy involving wages and compensation and not the matters litigated in the plaintiff's Complaint. Neither the District Court nor the Circuit Court Panel has sufficiently differentiated or acknowledged this full evaluation of controlling law. It is not contested that a release general in its terms and containing no limitations would dispose of all matters in controversy. This, however, is not the fact in the instant case. The

letter speaks for itself in all its specificity and limitations.

It is not disputed that the case relied on by defendants, Lucio v. Curren, 2 N.Y. 2d 157, 157 N.Y.S. 2d 948 (1956) is a statement of the law on general releases which contain no words of limitation. As that case demonstrates, when there have been protracted, deliberate negotiations on issues between the respective parties' attorneys and the releasor's attorney has drafted a general release after defendants' counsel had rejected a prior release containing words of limitation, the Court correctly found that a general release had been executed and was operative. The general release in Lucio consisted in its entirety of broad, all exclusive language and contained no recitals of specific limitation.

The decision in Lucio, however, represents part of the law, that portion that does not relate to the words of limitation used in their August 10th letter. The law applicable to such a release containing specific claims, as in the August 10th letter of the instant case, is likewise not in dispute. It is clearly expressed in Topat Equipment Co., Inc. v. Parsen, 50 App. Div. 2d 1098, 377 N.Y.S. 2d 339 (1975):

"So if, from the recitals therein

or otherwise, it appears that the release is to be limited to only particular claims, demands, or obligations, the instrument will not be operative as to those matters alone, and will not release other claims, demands or obligations. Thus, the words of a general release are limited by a recital of a particular claim." P. 34
(Emphasis added)

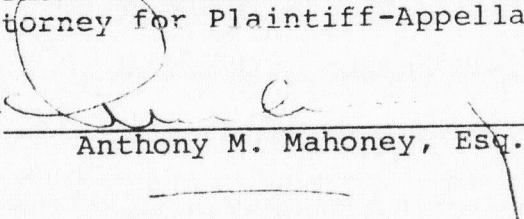
This law, the law applicable to this case, has not been considered in the opinions of the District or Circuit Court or applied to the letter of August 10th.

This settled New York law has been overlooked by the Court in its affirmation of the dismissal of this case on defendants' motion for summary judgment. The application of this clearly applicable law by this Court should result in a reversal of the Rule 12 dismissal and a remand for a final adjudication of the issues on their merits.

Respectfully submitted,

ANTHONY M. MAHONEY, ESQ.
Attorney for Plaintiff-Appellant

By


Anthony M. Mahoney, Esq.

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SECOND CIRCUIT

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Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 9th day of June, 1977 at 63 Wall Street
New York, N.Y.

deponent served the annexed

Seward & Kissel, Esqs. upon

Petition for Rehearing

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 9th
day of June, 1977

Robert T. Brinn
ROBERT T. BRINN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

Kevin E Thomas
Print name beneath signature
KEVIN E. THOMAS